

**UNITED STATES GOVERNMENT  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

STARRETT CITY ASSOCIATES  
Employer-Petitioner<sup>1</sup>

and

Case No. 29-UC-518

INTERNATIONAL UNION OF  
OPERATING ENGINEERS,  
LOCAL 30, 30A, AFL-CIO  
Union

**DECISION AND ORDER**

Starrett City Associates (the Employer-Petitioner) owns and operates a large complex of residential apartment buildings in Brooklyn, New York. Employees at its power plant, including various engineers and mechanics, have been represented by the International Union of Operating Engineers, Local 30, 30A, AFL-CIO (the Union), for at least 25 years. The Employer has filed a petition for clarification under Section 9(b) of the National Labor Relations Act, seeking to clarify the bargaining unit by excluding the lead engineer on the grounds that he is a supervisor as defined in Section 2(11) of the Act. The Union disagrees, contending that the lead engineer is a non-supervisory employee. A hearing was held before James Kearns, a Hearing Officer of the National Labor Relations Board.

---

<sup>1</sup> The Employer filed the petition for clarification under the name “Starrett City Associates,” and stipulated that it is a corporation. However, documents admitted into the record indicate the Employer’s name as “Starrett City, Inc.” (Er. Ex. 3) and “Starrett City, Inc., as general partner and on behalf of, Starrett City Associates, a limited partnership” (Er. Ex. 1). Thus, the Employer’s exact name and corporate status are not entirely clear from the record.

In support of its contention that the lead engineer is a supervisor, the Employer called the director of its power plant, Ralph Vanacore, to testify. The Hearing Officer questioned the lead engineer himself, Joseph Land.

As discussed in more detail below, I conclude that the lead engineer is not a statutory supervisor, and I will therefore dismiss the Employer's petition for clarification.

### **Facts**

Starrett City is a housing complex with 46 buildings, including more than 5,000 apartments, some garages, and a sports club. Its power plant provides all utilities for the complex, including electricity, heating, air conditioning and hot water. The Employer employs approximately 34 engineers, mechanics, technicians and apprentices who work in three shifts to operate and maintain the power plant on a continuous basis. The Union involved herein has represented this unit of mechanical department employees for at least 25 years. The Employer and Union have been parties to successive collective bargaining agreements, the most recent of which was effective from May 1, 2000, to April 30, 2003.<sup>2</sup> There is also another unit of electrical employees represented by International Brotherhood of Electrical Workers, Local 3, AFL-CIO, which is not relevant to this case.

The director of the power plant is Ralph Vanacore, and the assistant director is Rickford John. The lead engineer position in dispute is currently held by Joseph Land. Land

---

<sup>2</sup> The 2000-2003 agreement described the bargaining unit as “all personnel in the power house other than the Director, Assistant Director, Electrical Technician and Electricians” (Er. Ex. 1). During the hearing, the parties stipulated that the bargaining unit specifically included all full-time and regular part-time engineers, instrument technicians, lead mechanics, instrument mechanics, welder mechanics, mechanics, operation mechanics and apprentices employed at the Employer’s Brooklyn facility.

has been employed by the Employer for 30 years, previously as a watch engineer. He has been the lead engineer for approximately one and a half years.

The Employer's written job description for the lead engineer position (Er. Ex. 2) reads as follows:

Person in charge in absence of Director and Assistant Director. Responsible for all maintenance in Power Plant, garages and community center, etc. Lays out work, assigning all persons to work duties. Orders all supplies for mechanical operation of Plant. Must be familiar with all phases of Plant operation and maintenance.

The parties stipulated that Land does not have authority to hire, suspend, lay off, recall, promote, discharge, reward or discipline employees. Likewise, the Employer presented no evidence that Land has authority to transfer employees, or to adjust their grievances, or to effectively recommend such actions. Rather, the Employer contends that Land is a supervisor solely because he has authority to assign and direct employees using independent judgment.

The two witnesses, Vanacore and Land, testified consistently with each other. Except where noted below, there is very little factual dispute in the record.

The mechanical department has two sub-components: operations and maintenance. As its name indicates, the operations department actually operates the power plant. That department employs approximately 15 employees: five watch engineers, five operator mechanics and five apprentices (Er. Ex. 3). They work in three shifts, around the clock. The operations day shift typically consists of three employees from the mechanical department (one watch engineer, one operator mechanic and one apprentice), plus one electrical mechanic from the electrical department. Vanacore testified that the operations group has "fixed" duties. There is no evidence that the lead engineer has any role in assigning the operations employees.

The maintenance sub-component of the mechanical department is responsible for maintaining and repairing the power plant. The maintenance department employs one lead mechanic<sup>3</sup> and approximately eight “day mechanics,” including a welder, instrument mechanic and diesel mechanic (Er. Ex. 3). They all work on the day shift, from 7:00 a.m. to 3:00 p.m. The mechanics usually work in teams of two. According to Vanacore, their duties are less “fixed” than the operations department’s duties. Although most of their work is routinely-scheduled, recurring maintenance work, they also must deal with unexpected repairs and emergencies. Thus, the maintenance department’s work must be determined and assigned on a daily basis.

The lead engineer also works from 7:00 a.m. to 3:00 p.m. Land testified that at approximately 2:00 p.m., i.e., near the end of each day shift, he begins to compile a tentative list of the maintenance jobs for the next day. He tours the plant and checks with mechanics to see which jobs will be finished by the end of the day, and which jobs need to continue into the next day. He also uses his own observations of what needs to be done, and relies on reports from the mechanics as to what equipment might need unscheduled maintenance or repair. Land then makes a hand-written list of jobs for the next day. For example, Land’s list for Friday, November 14, 2003 (Er. Ex. 4) shows five jobs, including welder mechanic William Fallon and mechanic John Mescall assigned to “check out brickwork in #2 blr [boiler] and start repair work,” mechanics James Gilberti and Salvator Caccavale assigned to “remove catwalk from that location to another [another] location so the truck can take away dumpster, also do the north and south sight glass boiler #2,” and so forth.

---

<sup>3</sup> The record contains no evidence regarding the lead mechanic’s duties.

Before the end of the shift, Land submits his hand-written list to assistant director Rickford John, and they review it together. Vanacore testified that Land and John work “hand in hand” to finalize the work list for the next day. Vanacore described the items assigned by Land in this manner as “basic” maintenance and repair work, including “routine” maintenance for equipment that needs to be serviced on a “continuous” or “repetitive” basis, at times pre-established by Vanacore.<sup>4</sup> Vanacore conceded that Land does not have authority to decide on major or long-term projects, such as replacing equipment or systems, or boiler refurbishment. Rather, when the director or assistant director (Vanacore or John) decide on a non-routine project, they talk to Land about how to fit it in with the regular assignments. Both Vanacore and John have authority to identify jobs which must be added to the list, and to determine their priority. Vanacore estimated that four out of five assignments on a typical day come from Land’s original list, and one out of five is added by John or Vanacore.

Eventually, assistant director John enters all the information into a computer database, and prints out a one-page list of jobs for the next day (Ex. Er. 5), as well as separate work-order forms for Land to distribute to the mechanics the next morning.

When Land arrives at 7:00 the next morning, he opens the shop and his office, and then reads the night-shifts’ log books in the control room. He does not distribute the work orders immediately. For one thing, Land testified that the work orders are stored in Vanacore’s office overnight, and that he has to wait until “they” arrive to get the orders.

---

<sup>4</sup> Vanacore said the “set up” is that he has “specifically identified” times when the equipment needs to be serviced. (Transcript p. 52). The record is silent as to whether there are any operating manuals or other written policies or procedures governing the scheduling and assignment of maintenance work.

(Vanacore arrives at 7:30 a.m.) But, more importantly, Land and John and Vanacore must review the log-book information every morning, to find out if the night shifts reported any additional maintenance or repairs that need to be done. Land testified that he confers with Vanacore and/or John each morning to discuss whether any items from the night-shift log books are urgent (in which case they may take priority over the pre-existing work orders for that day) or can be scheduled for a later day. Thus, every morning John, Land and Vanacore go through a collaborative process of assessing and possibly re-adjusting the work orders for the day, depending on the night shift reports.

After this process is complete, Land distributes the work-order forms, and the mechanic teams start their work. He then spends the rest of the day making rounds at various locations in the power plant and garages, to check on the progress of various jobs; to see if the mechanics need any technical advice, assistance, tools, materials or parts; and to inspect the work. The witnesses differed as to whether Land performs any “hands-on” work. Vanacore testified that Land does not, whereas Land testified that he sometimes helps the teams do their work. In any event, there seems to be no dispute that Land spends most (if not all) of his time on the “floor,” monitoring and assisting the mechanics in their work. Although he does not have authority to order parts on his own, he can submit requests for parts, subject to Vanacore’s approval.

Assignments may need to be re-adjusted during the course of the day shift, if an urgent matter unexpectedly arises. It appears that Vanacore determines the priority or urgency of potential repairs, i.e., when the assignments need to be changed, and then Land decides specifically who should be reassigned. Vanacore testified that if he determines that a certain

job is “A” priority, Land (or John) might have to tell a mechanic stop what he is doing and start the priority job. Vanacore “leaves it up to” Land or John to select which mechanic(s) should be re-assigned, depending on the status of the other jobs. Similarly, Land testified that when “the office” tells him that a certain job must be done right away, he chooses two mechanics who are not in the middle of another important job, such as fixing a pump.

The record testimony is somewhat sparse regarding whether the lead engineer uses independent judgment in assigning work to employees. Vanacore initially testified that Land knows the mechanics’ skills, and matches them to what the particular job is (Tr. 29).

Vanacore later started to say that the Employer has certain classifications which determine the assignment, such as “a welder welds” (Tr. 35), but then was interrupted by an argument between counsels over classifications in the collective bargaining agreement. When the direct examination resumed, the Employer’s counsel asked a leading question, whether Land bases the assignment on his evaluation of the mechanics’ capabilities, and Vanacore answered affirmatively (Tr. 36). No specific examples were given. Land himself testified that he tries to get all the mechanics to learn every phase of the job. For example, if one mechanic is good at packing pumps and another is not, Land pairs the two together so one can learn from the other. Later, when asked whether employees’ skills play a role in assigning overtime work, Land said no, that “everybody’s skilled there.” There was no other evidence to indicate whether, or how, the lead engineer must assess employees’ skills as part of deciding on their assignments.

When asked whether Land is “held responsible” for the completion of the mechanics’ work, Vanacore answered affirmatively. No specific examples were given. There is no evidence that Land has disciplined or even reported an employee for poor work performance.

Land plays no role in scheduling employees, or granting time off. He does not tell employees when to take their breaks. He does not have authority to grant overtime work. Near the end of the shift, if Land believes that an important job should be finished, he may ask permission to keep a couple of mechanics on overtime to finish the job. However, Land testified that “the office” usually denies his request because “they” prefer to finish the work the next morning. In cases where Vanacore has authorized overtime, Land may “canvass” the employees, to help make a list of which employees are willing to stay.

Vanacore testified that he (Vanacore) and/or the assistant director (John) are usually present at the facility. However, “occasionally” when neither one is there, Land is the person in charge. Vanacore did not specify how often this occurs, and Land did not address this issue at all.

Vanacore also testified that Land attends a monthly meeting with John, Vanacore and Vanacore’s superior (director of technical services, A. Salim Qureshi) to review “where we are going” with all the systems and components of the power plant.

Land punches a time card and wears a uniform, whereas John and Vanacore do not. Land’s wages and benefits are governed by the collective bargaining agreement. Under the most recent agreement (Er. Ex. 1), the lead engineer’s hourly rate was \$49.5498, which is higher than the other classifications’ wage rates, ranging from \$32.8462 to \$42.0911 per hour.



## **Discussion**

Section 2(11) of the Act defines a supervisor as follows:

The term “supervisor” means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not merely of a routine or clerical nature, but requires the use of independent judgment.

In enacting Section 2(11)'s definition of "supervisor," Congress stressed that only individuals invested with "genuine management prerogatives" should be considered supervisors, as opposed to "straw bosses, leadmen ... and other minor supervisory employees." Quadrex Environmental Co., Inc., 308 NLRB 101, 102 (1992)(quoting S.Rep. No. 105, 80th Cong., 1 Sess. 4 (1947)). It has long been the Board's policy not to construe supervisory status too broadly, since a finding of supervisory status deprives individuals of important rights protected under the Act. Id. A party who seeks to exclude alleged supervisors from a bargaining unit therefore has the legal burden of proving their supervisory status. NLRB v. Kentucky River Community Care, 532 U.S. 706 (2001)(“Kentucky River”); Tucson Gas & Electric Co., 241 NLRB 181 (1979); The Ohio Masonic Home, Inc., 295 NLRB 390, 393 (1989). Furthermore, to prove supervisory status under Section 2(11), the party must demonstrate not only that the individual has certain specified types of authority over employees (e.g., to assign or responsibly direct them), but also that the exercise of such authority requires the use of "independent judgment," and is not “merely routine or clerical” in nature.

In the Kentucky River decision, *supra*, the Supreme Court reaffirmed that the burden of proving supervisory status rests on the party asserting it. However, the Court rejected the

Board's interpretation of "independent judgment" in Section 2(11)'s test for supervisory status, i.e., that alleged supervisors do not use "independent judgment" when they exercise ordinary professional or technical judgment, or judgment based on greater experience, in directing less-skilled employees to deliver services in accordance with employer-specified standards. Thus, the Board must seek to interpret the statutory distinction between "routine" and "independent" judgment, without categorically discounting judgment based on professional/technical expertise or greater experience.

The Board has done so in such post-Kentucky River cases as Beverly Health and Rehabilitation Services, Inc., et al., 335 NLRB 635 (2001), *enforced in relevant part*, 317 F.3d 316 (D.C. Cir. 2003), where nursing-home LPNs' role in directing the work of CNAs was seen as requiring only "routine" authority rather than independent judgment. Id. at fn. 3. In that case, the Board upheld the administrative law judge, who found that the CNAs' work was repetitive, and that the LPNs simply had to relate the patients' care requirements from a written report. There was no evidence that the LPNs used independent judgment in assigning the "basic tasks" to particular CNAs, who all performed "the same care, in the same manner, for the same people" every day. Id., slip op. at 35. The Board did not rely on any distinction -- rejected by the Supreme Court -- between the LPNs' use of technical judgment in deciding on patient care, versus supervisory judgment in deciding how to delegate the specific tasks. Nevertheless, the LPNs' direction of CNAs' work did not require the level of independent judgment to warrant a finding of supervisory status.

Similarly, in Los Angeles Water and Power Employees' Association, 340 NLRB No. 146 (2003), a lead clerical employee was found to be non-supervisory although she

occasionally told employees to fill in for one another. Since all the clerical employees were cross-trained to cover for one another, the lead clerical's role was simply to notify employees when they needed to assume that role. The Board held that this "routine shifting of employees" does not evidence supervisory status. *Id.*, slip op. at 3, citing Hexacomb Corp., 313 NLRB 983, 984 (1994)(finding that individuals are not supervisors despite authority to "shift employees around ... to get projects done"). *See also* Quality Mechanical Insulation, Inc., 340 NLRB No. 91 (2003)(foreman's authority to assign various types of insulation work to employees, where all employees were expected to perform every type of insulation necessary, does not require independent judgment).

By contrast, in another post-Kentucky River case, the Board found towboat pilots to be supervisors, in part because their direction of the boat crew required independent judgment. American Commercial Barge Line Co., 337 NLRB No. 168 (2002). In that case, the pilots had authority to post one or more lookouts and to assign an extra crew member whenever they deemed necessary, even if this assignment entailed overtime pay. Significantly, these judgments were based on the pilots' assessment of the crew (e.g., whether a "green" or inexperienced crew member was on board), as well as other "nonroutine" factors (weather, traffic, the boat's condition, the type of cargo, and so forth). *Id.*, slip op. at 2. The Board explicitly rejected any purported distinction between the pilots' greater technical expertise/experience and their supervisory authority. *Id.*, slip op. at 3.

These cases suggest that simply dividing up tasks among "interchangeable" employees who essentially perform the same work is routine, whereas assessing the relative skills of different employees in directing their work may require independent supervisory judgment. *See*

*also* Franklin Hospital Medical Center, 337 NLRB No. 132, slip op. at 5 (2002)(“Franklin Hospital”), citing Brusco Tug & Barge Co. v. NLRB, 247 F.3d 273, 278 (D.C. Cir. 2001)(“Courts typically consider assignment *based on assessment of a worker’s skills* to require independent judgment,” emphasis added). In addition, the Board has held that assignment of tasks within employer’s pre-established parameters, or based on such obvious factors as whether an employee’s workload is light, does not require independent judgment, Franklin Hospital, *supra*, slip op. at 5, and that decision-making governed by “common-sense considerations” is not supervisory, NLRB v. Meenan Oil Co., 139 F.3d 311, 321 (2nd Cir. 1998), citing B.P. Oil Co., Inc., 256 NLRB 1107, 1109-10 (1981), *enfd.* 681 F.2d 804 (3rd Cir. 1982).

Finally, the Board has held that conclusionary statements by witnesses, without specific evidence to support those statements, do not demonstrate supervisory status. Sears, Roebuck & Co., 304 NLRB 193 (1991). Specifically, the Board has held that proving the use of independent judgment in assigning employees requires “concrete evidence” showing how assignment decisions are made. Franklin Hospital, *supra*, slip op. at 5. *See also* Nathan Katz Realty, LLC, et al. v. NLRB, 251 F.3d 981, 990 (D.C. Cir. 2001)(employer’s claim that alleged supervisors exercise independent judgment by balancing “conflicting demands” rejected, without specific evidence in the record to support the claim).

In the instant case, I find that the Employer has not met its burden of proving that the lead engineer uses independent judgment in assigning or directing employees.

There are generally two aspects to assigning work: deciding what tasks should be done, and deciding which specific employees should do which tasks. As for the first aspect,

the record indicates that Land decides only the “basic” maintenance and repairs, including routine maintenance for equipment that needs to be serviced at times pre-established by Vanacore. Any major or long-term projects, such as replacing equipment or systems, are determined by Vanacore. Furthermore, the preliminary list of jobs that Land devises each day is subject to review by his superiors. Specifically, Land and assistant director John work “hand in hand” to finalize the list at the end of each day shift, and then Vanacore and John review the list again in the morning to account for any night-shift reports. Furthermore, if any unexpected repairs arise during the day shift, Vanacore and John have authority to readjust the list of what jobs need to be done. In short, although the lead engineer plays some role in deciding what needs to be done, it is limited to the preliminary, routine scheduling of basic maintenance and repairs, constantly subject to his superiors’ review and re-prioritizing.

As for the second aspect of assigning work, there is no dispute that Land has authority to select which specific employees should complete the required tasks. Nevertheless, the Employer’s evidence fails to demonstrate that the selection requires independent judgment. Although the Employer’s witness responded affirmatively when asked whether Land bases the assignments on his evaluation of the mechanics’ capabilities, no specific examples were given. As noted above, such conclusionary testimony, without specific and competent examples to support it, is insufficient to prove supervisory status. Other evidence in the record suggests that, at least in some cases, Land’s selection of specific employees is pre-determined by their classifications, e.g., choosing the welder to do the welding. In other cases, Land’s assignments may be based on other obvious, common-sense considerations, such as the mechanics’ respective workloads. Finally, Land testified that “everyone’s skilled there,” and that he tries

to get all the mechanics to learn every phase of the job. Overall, since the record is somewhat sparse on this point, it is difficult to determine whether Land must assess the mechanics' relative skills, or whether the mechanics are essentially "interchangeable." It is therefore difficult to determine whether Land's assignment of work is based on non-routine factors (as the towboat pilots in American Commercial Barge, supra), or whether it is simply the "routine shifting" of interchangeable employees (as in Los Angeles Water and Power Employees' Association and the other post-Kentucky River cases cited above).

Ultimately, since the Employer has petitioned to exclude the lead engineer from the bargaining unit, it is the Employer's burden to prove his supervisory status. The Employer argues that Land is a statutory supervisor inasmuch as his assignment and direction of employees requires independent judgment. However, the record contains no specific, concrete evidence to support that claim, such as examples demonstrating that Land must assess the employees' skills or other non-routine factors. I therefore find that the Employer has failed to meet its burden in this regard.<sup>5</sup>

Furthermore, the Employer's argument that the lead engineer is "responsible for" and "in charge" of the plant operation is undercut by the presence of two superiors, the director and assistant director. Although Vanacore testified that Land is "occasionally" in charge of the plant when Vanacore and John are both absent, the record indicates neither

---

<sup>5</sup> Cases cited in the Employer's briefs are distinguishable. For example, in McClatchy Newspapers, Inc., 307 NLRB 773 (1992), the supervisory press operators were found to have used independent judgment in assigning work to crew members based on their consideration of the employees' abilities, job priorities and the employer's production and efficiency requirements. Id. at 779. Furthermore, the press operators were vested with "significant responsibility," including deciding when to stop or slow down the presses, which entailed overtime work for crew members and other employees.

how often this occurs, nor whether Land exercises any true supervisory authority during those times. Persons exercising only sporadic or irregular supervisory functions are not statutory supervisors. Latas de Aluminio Reynolds, 276 NLRB 1313 (1985). There is no evidence that Land spends a substantial amount of time being solely “in charge.”<sup>6</sup> Furthermore, the Employer submitted no evidence that Land has actually been held responsible or accountable for the mechanics’ performance. Cf. Schnurmacher Nursing Home v. NLRB, 214 F.3d 260 (2nd Cir. 2000)(charge nurses found to be supervisory, in part, because they were disciplined for failing to direct the assistants properly in providing patient care).

In short, I find that the Employer has failed to meet its burden of demonstrating that the lead engineer uses independent judgment in assigning or responsibly directing employees. Furthermore, there is no evidence that Land has authority to hire, transfer suspend, lay off, recall, promote, discharge, reward or discipline employees, to adjust their grievances, or effectively to recommend such actions. Absent proof of such “primary” statutory criteria, proof of any secondary indicia (e.g., earning a higher wage rate, attending management meeting, having an office) is insufficient to support a finding of supervisory status. Training School at Vineland, 332 NLRB 1412, 1417 (2000).

Accordingly, based on the foregoing, I will dismiss the Employer's petition for

---

<sup>6</sup> By contrast, the welder in a case cited by the Employer, Custom Bronze & Aluminum Corp., 197 NLRB 397 (1972), was found to be a supervisor in part because he had the “*sole responsibility*” (emphasis in original) for assigning the workload, and because his superiors “hardly ever” went into the work area. Similarly, the maintenance supervisor in a more recent case, Arlington Masonry Supply, Inc., 339 NLRB No. 99 (2003), was found to be a supervisor in part because he was the “only one” making assignments in the employer’s vehicle maintenance garage. The employer’s general manager visited the garage for only 15 minutes per week. (In that case, the maintenance supervisor also had authority to create the mechanic’s work schedule, to assign overtime and to grant time off.)

clarification.

### **CONCLUSIONS AND FINDINGS**

Upon the entire record in this proceeding, I conclude and find as follows:

1. The parties stipulated that Starrett City Associates is a domestic corporation with its principal office and place of business located at 1310 Pennsylvania Avenue, Brooklyn, New York. It owns and operates a complex of residential apartment buildings. During the past 12 months, the Employer derived gross revenues in excess of \$500,000, and purchased and received goods and materials valued in excess of \$5,000 directly from outside the State of New York. I find that the Employer is engaged in commerce within the meaning of the Act, and that it will effectuate the purposes of the Act to assert jurisdiction in this case.

2. International Union of Operating Engineers, Local 30, 30A, AFL-CIO, is a labor organization as defined in Section 2(5) of the Act.

3. In accordance with the discussion above, I reject the Employer-Petitioner's contention that the lead engineer is a supervisor as defined in Section 2(11) of the Act.

### **ORDER**

Accordingly, IT IS HEREBY ORDERED that the petition be, and it hereby is, dismissed.

### **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. This request must be received by December 31, 2003. The request may **not** be filed by facsimile.



Dated: December 17, 2003.

---

David Pollack  
Acting Regional Director, Region 29  
National Labor Relations Board  
One MetroTech Center North, 10th Floor  
Brooklyn, New York 11201

177-8560-1500, 177-8560-4000,  
177-8560-5000, 177-8560-9000